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IN THE MATTER OF:		
Walter R. Eames Claimant		
Against	Case Nos.:	1999-LHC-2364 1999-LHC-2365
General Dynamics Corporation Employer/Self-Insurer	OWCP Nos:	1-105347 1-78171
and		
Director, Office of Workers' Compensation Programs U.S. Department of Labor Party-in-Interest		

APPEARANCES:

Stephen C. Embry, Esq.
For the Claimant

Peter A. Schavone, Esq.
For the Employer/Self Insurer

Merle D. Hyman, Esq.
Senior Trial Attorney
For the Director

BEFORE: **DAVID W. DI NARDI**
Administrative Law Judge

DECISION AND ORDER - AWARDING BENEFITS

This is a claim for worker's compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended (33 U.S.C. §901, **et seq.**), herein referred to as the "Act." The hearing was held on January 27, 2000 in New London, Connecticut, at which time all parties were given the opportunity to present evidence and oral arguments. The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a Claimant's exhibit, DX for a Director's exhibit and RX for a Employer's exhibit. This decision is being rendered after having given full consideration to the entire record.

Stipulations and Issues

The parties stipulate, and I find:

1. The Act applies to this proceeding.

2. Claimant and the Employer were in an employee-employer relationship at the relevant times.

3. On December 21, 1988, Claimant suffered an injury in the course and scope of his maritime employment.

4. Claimant gave the Employer notice of the injury in a timely manner.

5. Claimant filed a timely claim for compensation and the Employer filed a timely notice of controversion.

6. The parties attended an informal conference on June 23, 1999.

7. The applicable average weekly wage is $651.71.

8. The Employer voluntarily and without an award has paid compensation from March 23, 1989 for various periods of time. (RX 5 - RX 8)

The unresolved issues in this proceeding are:

1. Whether Claimant is entitled to the concurrent benefits he seeks herein.

2. If so, the nature and extent of his disability, and for which periods of time.

3. The applicability of Section 8(f) of the Act.

Post-hearing evidence has been admitted as:

Exhibit No.	**Item**	**Filing Date**
ALJ EX 8	This Court's Order directing that post-hearing briefs be filed herein	02/02/00
CX 12	Claimant's Brief	02/14/00
RX 29	Attorney Schavone's letter	03/06/00

filing the

RX 30	February 15, 2000 Deposition Testimony of Dr. Philo F. Willetts, Jr.	03/06/00

The record was closed on March 6, 2000 as no further documents were filed.

Summary of the Evidence

Walter R. Eames ("Claimant" herein), sixty-two (62) years of age, with an eleventh grade formal education and a GED obtained thereafter, plus one year of college, and an employment history of manual labor, began working on December 1, 1975 as a sheet metal mechanic at the Quonset Point facility of the Electric Boat Company, then a division of the General Dynamics Corporation (“Employer”), a maritime facility adjacent to the navigable waters of the Narragansett Bay and the Atlantic Ocean where the Employer builds components and hull sections which are then transported by ocean-going barges to the Employer's Groton, Connecticut shipyard where the components and sections are installed upon the submarines being built, repaired or overhauled at the shipyard. He performed his assigned duties all over the facility and he gradually progressed in job responsibilities and was promoted to a front line foreman, then to a general foreman and then to a superintendent. As a sheet metal mechanic Claimant daily used various tools, including air-powered vibratory machines, to lay out and build various components and sections for the boats. Several times each day he had to lift sheets of steel weighing as much as seventy (70) pounds. After a year or so he became a front line foreman in the joiner or locker shop and he supervised eight workers at first, and then thirty to forty workers when he was assigned “the waterfront and high bay.” (TR 16-20; RX 27 at 3-9, RX 9)

Claimant who enjoyed good health before going to work for the Employer injured his right wrist on May 22, 1984 when, while working on the top section of a cylinder in Building K60T, he slipped on a ladder, fell about three feet and hit his wrist on the staging. He reported the injury to his supervisor and he then went to First Aid where a “right wrist” injury was diagnosed and the Employer that day, having actual knowledge of that injury, authorized treatment by Putnam Orthopedics. (RX 27 at 9-10) He was treated by Dr. Bouthillier and, as the injury “caused a ganglion in (his) wrist,” the doctor operated to correct that problem; he was out of work from September 20, 1984 through October 14, 1984 and the Employer paid appropriate compensation for that work absence caused by the injury. (RX 8, RX 27 at 10-12) That surgery did not produce the expected results and Claimant has undergone five (5) surgical procedures on his right wrist and this injury is best summarized by the August 16, 1999 eleven page report of Dr. Philo

F. Willetts, Jr., an orthopedic surgeon who saw Claimant at the Employer's request (RX 10):

WORK STATUS: He said that he was out of work for one or two days after the 1984 incident. He has been out of work because of his heart condition since December 21, 1988.

PAST MEDICAL HISTORY was said to be positive for diabetes, in good control. He said he has hypertension. He has angina. He has had pneumonia in the past. He said he has had a basal cell cancer of the skin.

Surgery: The five right wrist surgeries, knee surgery June 30, 1999, by Dr. O'Connell for a torn cartilage, injured in May, 1999.

Allergies: Penicillin, Tetanus toxoid vaccinations

Medications: Atenolol, Norvasc, Minoxidil, Zestril, Zoloft, Nitro Patch, aspirin, Glucophage.

REVIEW OF SYSTEMS was said to be positive for a hearing loss which he has attributed to his work at Electric Boat Corporation. There is a claim for that condition. He said that he gets occasional chest pain and occasional shortness of breath. He has had two calcium kidney stones. He has lost 20 pounds of weight recently. He said he quit smoking five years ago and does not drink alcohol...

DIAGNOSIS:

1. Osteoarthritis right wrist, status post previous ganglion excision - preexisting.
2. Status post fusion right wrist, solidly healed in good position.
3. Status post surgical release first dorsal compartment tendons and carpal tunnel with good neurological examination and no sign of residual carpal tunnel symptoms.
4. No history or evidence of any back or neck pain or abnormality.

DISCUSSION: I will try to respond to your questions in order as follows:

1. *Is he currently disabled due to this injury and is it the sole cause of his disability?*

Walter Eames is partially disabled as a result of his right wrist. This is not the sole or even the major cause of his disability. Mr. Eames was retired from Electric Boat Corporation because of nonwork-related severe hypertension and also has cardiac disease.

2. *If so, is he totally disabled or may he perform selected work?*

With respect to his right wrist, he is not totally disabled and could perform a wide variety of selected work. His current disability is based on his hypertension and cardiac condition - conditions that are outside my area of expertise.

3. *If capable of light work, what restrictions would you place on him?*

With respect to the right wrist, he should avoid lifting more than 10 pounds, avoid pushing or pulling more than 50 pounds, avoid climbing vertical ladders, and avoid crawling. There would be no other restrictions with respect to the right wrist.

4. *Has he reached a point of maximum medical improvement?* Yes.

5. *If so, when?*

Mr. Eames stated that his right wrist never improved. In my opinion, he reached maximum medical improvement approximately six months after his August 8, 1994 surgery, or as of February 12, 1995.

6. *If so, what percentage of permanent functional loss of use pursuant to the Fourth Edition of the AMA **Guidelines** does he have due to this condition? Please apportion the impairment specific to the injury and the impairment attributable to the preexisting conditions or factors.*

Using as a guide the American Medical Association **Guides to the Evaluation of Permanent Impairment**, Fourth Edition, there is a permanent partial physical impairment determined as follows.

With respect to a fused right wrist in good position and using Table 26 on page 36, there is a 21% permanent partial physical impairment of the right upper extremity.

Using Table 2 on page 19 of the AMA **Guides**, 21% permanent partial physical impairment of the right upper extremity is equivalent to 23% permanent partial physical impairment of the right hand.

There are no signs of residual carpal tunnel syndrome or tendonitis and no additional impairment that would be rated for that.

Thus, the above impairment totals 23% permanent partial physical impairment of the right hand.

APPORTIONMENT: Mr. Eames denied having any previous injuries to his right wrist or hand, and I am unaware of such. The medical records of Dr. Bouthillier, within a few months of his May, 1984 injury,

made no mention of any other previous injuries or preexisting conditions.

The medical records about December, 1988, were not available to note whether there was any other injury claimed on or about the time of December 21, 1988. Mr. Eames designated that date as the date that he stopped working at Electric Boat Corporation because of his unrelated severe high blood pressure. Absent any history or documented evidence of another injury on or about December 21, 1988, it appears that the injury to the wrist was sustained in May, 1984.

Thus, the 23% permanent partial physical impairment of the right hand appears to be most fairly apportioned to the injury of May, 1984, and apparently reported as a claim on December 21, 1988, if the history be correct.

7. *Is his injury of 12/21/88 causally related to his employment at Electric Boat Corporation?*

The condition reported December 21, 1988 did appear to be causally related to his employment at Electric Boat Corporation, if the above history be correct.

8. *Did he have any previous condition or injury which would combine with this injury to make his present injury materially and substantially greater?*

Yes. He had severe preexisting high blood pressure and angina. He had had two arthroscopic surgeries of his knee several years before. Thus, his previous injuries and conditions, when combined with the condition reported December 21, 1988, did produce a materially and substantially greater injury than what would have been produced by the condition reported December 21, 1988, alone.

9. *Could you ask the Claimant if he has worked in any capacity since his injury? What physical activity does he engage in?*

He said that he has not worked at all or in any capacity since December 21, 1988.

Currently, he said he did housework two hours per day, cleaned his pool and operated a riding mower, watched television four hours per day, read one-half hour per day, swam in a pool one to two hours per day, went shopping and ran errands three to four hours per week, and occasionally watched the NASCAR car races at Thompson's Speedway," according to Dr. Willetts.

Dr. Willetts reiterated his opinions at his February 15, 2000 deposition and the transcript thereof is in evidence as RX 30.

Dr. Joseph P. Zeppieri, an orthopedic surgeon, issued the following report with reference to Claimant's impairment of the right upper extremity as of September 28, 1999 (RX 11 at 34):

The average grip strength in the right hand is 75 lbs., in the left hand 90 lbs. Therefore, he has a permanent partial impairment rating of 5% of the dominant right upper extremity because of the loss of strength.

For the ankylosis in 10○ of flexion and 10○ of ulnar deviation he has 21% and 9% loss, respectively. He has supination to 90○ and pronation 60○, affording a 1% upper extremity impairment for the loss of pronation.

The matched ulnar arthroplasty is essentially an ulnar head restriction, and Table 27 allows an 8% upper extremity impairment for that.

All of these ratings are by using the **Guides To The Evaluation of Permanent Impairment**, Fourth Edition, published by the AMA, Chapter 3.

Using the Combined Values Chart at the end of the text: 21% + 9% = 28%, 28% + 8% = 34%, 34% + 6% = 38%, 38% + 1% = 39%. Therefore, he has a permanent partial impairment rating of 39% of his dominant right upper extremity consistent with the aforementioned Guides.

Dr. Richard P. Fazio, a cardiologist, issued the following report on July 31, 1990 (RX 12-6):

In regard to your questions, Mr. Eames is quite good. Walter suffers from hypertension as well as depression. He is being currently treated by Dr. Ruffner for his depression. His blood pressure appears to be under reasonably good control at this time. The patient is limited only by his psychiatric problems. He does have severe hypertension and this would be exacerbated by extreme physical activity. However, I do not feel that he is limited at this point for desk work. His estimated return to work would probably be assessed by Dr. Ruffner.

As of September 18, 1991, Dr. Fazio reported as follows (RX 12-12):

My impression: Mr. Eames is 54. He has severe hypertension. He has left ventricular hypertrophy. He is to undergo orthopedic procedures as per Dr. Zeppieri. I see no contraindications at this time. The patient is quite a nervous type. Blood pressure is quite labile. I would recommend preoperative sedation, will be happy to follow the patient along with you and appreciate the opportunity to participate in the care of your patient.

Incidental note is that the patient has had angina in the past but has not a bout of angina pectoris over the last two to three months. It is most likely that his blood pressure, once it becomes malignant, exacerbates his underlying coronary disease, according to the doctor.

Claimant who has suffered from depression for many years because of certain employment and personal problems was referred for an evaluation by Walter A. Borden, M.D., and the doctor reported as follows in his May 11, 1990 letter to the Employer (RX 13):

Walter Eames is a 52 year old former supervisor at the Quonset Point facility of General Dynamics who alleges that through significant harassment from his supervisors he has had a flare-up of his blood pressure to dangerously high levels, which causes him to be totally disabled. Because his case has not been accepted and he has not received compensation benefits, it is alleged that the financial burden placed on him has aggravated his condition, thereby not resulting in the expected reduction of his blood pressure upon removal from the stressful situation.

Psychiatric evaluation was requested to assess his mental condition relative to the above.

EXAMINATION

The evaluation consisted of psychiatric diagnostic examination at my office on March 2, 1990 and April 11, 1990, psychological testing: Minnesota Multiphasic Personality Inventory-2, Millon Clinical Multiaxial Inventory-II, Millon Behavioral Health Inventory, Sentence Completion Test; and review of copies of reports by J. David Ruffner, M.D.

CONCLUSION

Walter Eames has chronic, relatively severe hypertension. He dates this back to 1978-79, but the medical records indicate earlier onset. There is also a significant family history of hypertension, heart disease and cerebral vascular disease.

Mr. Eames has had a variety of treatments, medical, psychiatric and in the belief that work stress was responsible for his hypertension, he was withdrawn from work. Apparently, his blood pressure has remained consistently high. In a sense, Mr. Eames' attributing his hypertension to work stress but now to financial worries in view of his being out of work and his blood pressure not responding, represents wishful thinking. I am sure he would like to think his blood pressure is due to either work or financial matters that can be changed and give him a sense of normality. In my opinion, he unfortunately has a condition that is intractable, chronic, and has not been effected (sic) to a significant degree by

psychological issues. It does not appear that a change in his work situation or financial condition would have a significant effect on his blood pressure.

Dr. Joseph R. Benotti, a cardiologist, examined Claimant on January 7, 1991 and the doctor concluded as follows (RX 25-2):

DIAGNOSIS: 1. Hypertension. 2. Coronary disease.

ASSESSMENT: It is my impression that there appears to be a causal relationship between the stress incurred by Mr. Eames in his job as a foreman for the Electric Boat Division, and the development of hypertension. It is also quite clear that this patient's hypertension is refractory to excellent medical management as he has so received.

It is my impression that Mr. Eames suffers from essential hypertension and coronary disease, the consequences of which are difficult to control. Blood pressure and angina pectoris, respectively...

It is my impression that this patient also has sustained an arthritic condition of his right wrist as a consequence of a traumatic fall. This has resulted in a painful right wrist with a recurrent ganglion and it is recommended that he undergo a fusion of his right wrist in order to resolve this problem.

Mr. Eames is unable to return to his regular work.

He could conceivably return to his work if his hypertension can be controlled to a blood pressure at or below 140/90 mm of mercury and not rising to more than 160 to 180 mm systolic with treadmill exercise. Likewise, he cannot return to work until such time as his blood pressure is controlled as outlined above and he does not experience angina.

At present it is conceivable that Mr. Eames could undertake some sort of sedentary activity where he is able to sit or stand at this sedentary activity with only occasional bending or squatting and not walking more than 50 feet at a stretch or climbing one flight of stairs at a stretch, according to Dr. Benotti.

Dr. Borden re-evaluated Claimant on January 20, 1992, at which time the doctor concluded as follows (RX 13-5):

From a psychiatric perspective, Mr. Eames is not disabled.

There are psychiatric issues, but these are not related to his work. He has been a perfectionistic, compulsive, driven man who is prone to worry. The most significant emotional issue in his life currently is concern, worry and threat of loss in relation to his

wife and her medical problems. She has had colitis for many ears, has arthritis, and was recently diagnosed with lupus.

Mr. Eames indicated his main problem at this point to be his right wrist, which was operated on in September, 1991 and which has not fully healed. The other main problems is chronic hypertension. He takes a variety of medications for hypertension and from his description and the medical reports it is under control.

From a functional point of view, he appears to be getting along relatively well. He states he has learned to use a computer, basically on his own with his wife's assistance, goes to meetings at the Fire Department, where he is able to share his experience of some thirty years, and keeps busy around the house making doll houses for his grandchildren and mowing the lawn.

He remains angry and bitter concerning what he perceives as unfair treatment by the Electric Boat. These are the feelings he experiences rather than depression.

Mr. Eames is capable of work in various capacities and in my opinion the only limitation would be his physical condition.

From a psychiatric point of view, he has reached maximum medical improvement.

Dr. Borden re-evaluated Claimant on July 28, 1993, at which time the doctor concluded as follows (RX 13-8)

In terms of his mental condition, chronic anger appears to be the issue linked to the Electric Boat. While there is some depression, it appears to be effectively treated now with antidepressant medication. The depression is related to serious problems in his family including anticipated loss.

Claimant's treating psychiatrist is Dr. J. David Ruffner and the doctor, who first saw Claimant on April 11, 1989, concluded as follows in his June 14, 1989 report (RX 14-5):

SUMMARY AND CONCLUSIONS:

After eight interviews with Walter Eames, two of which involved he and his wife, my current working diagnoses are the following: Dysthymic disorder, Generalized Anxiety disorder, Atypical Personality disorder with prominent dependent and passive aggressive features. I do feel that the difficulties that Walter Eames experienced while working for Electric Boat at Quonset Point materially contributed to his problem with hypertension. For whatever reasons at the present time, Mr. Eames views the job/work situation at Quonset Point as an extremely stressful one. At the present time he expects to receive bad work assignments. Work assignments which are not compatible with his medical doctor's

orders. On the other hand, at the present time Mr. Eames is unwilling to give up his retirement and other benefits that he has worked hard to obtain. He feels trapped by this situation and is somewhat immobilized, in terms of what action he should take to improve his situation. At the present time, I would not recommend that Mr. Eames return to his job at Quonset Point.

In his January 24, 1992 supplemental report, Dr. Ruffner states as follows (RX 14-9):

The following summary is in response to a request by National Employers regarding the individual psychotherapy given Mr. Eames over the past year.

Visits for Walter Eames for 1991 began on a weekly basis and then on a once every two/three week basis since March 1991. I am seeing Mr. Eames for supportive psychotherapy. He suffers from severe hypertension with his blood pressure averaging a very high 160/110.

Due to the depression associated with his health and financial worries, Mr. Eames is currently on Prozac 20mg. Daily.

In addition to the problems directly related to his depression and medical issues, he has the added concern of his wife's medical condition. She is also unable to work due to severe arthritis, secondary to Lupus.

I will be continuing individual psychotherapy on a bi-weekly basis for Mr. Eames and will periodically forward a summary as needed.

Dr. Wallace B. Lebowitz, a cardiologist, examined Claimant at the Employer's request and the doctor gave these diagnoses in his May 22, 1992 report (RX 17-3):

1. Hypertension, essential.
2. Hypertensive heart disease, with
    a. Left ventricular hypertrophy.
3. Chest discomfort, etiology uncertain.
4. Agitated depression.

According to the doctor, Claimant's essential hypertension has been documented since at least 1987, that he does have impairment from his hypertensive cardiovascular disease, “that he is not totally disabled by such condition,” that he certainly “should refrain from any activity which poses severe emotion or physical stress” but “is certainly capable of doing more sedentary activity such as bench and telephone work, simple paper work, bench work, filing and clerical work,” that he had reached “maximum improvement from the hypertensive point of view...in 1989 when his blood pressure was maximally controlled” and that his “impairment from his hypertensive cardiovascular disease” can reasonably be rated as

thirty (30%) percent of the whole person in accordance with AMA **Guides**. (RX 17-4)

The Employer has also referred Claimant for an orthopedic evaluation by Dr. Andrew Green and the doctor concluded as follows in his August 6, 1997 report (RX 22-2):

1. Chronic pain right hand and wrist.
2. Post-traumatic/postoperative arthritis of the index and middle finger carpal metacarpal joints.
3. Heterotopic bone right ulnar carpal joint.
4. Status post radiocarpal arthrodesis.
5. Status post volar ganglion excision.
6. Status post deQuervain's release.
7. Status post distal ulnar arthroplasty times two.
8. Chronic depression.
9. Hypertension.
10. Coronary artery disease.

DISCUSSION AND RECOMMENDATIONS

Mr. Eames is a 59-year-old right hand dominant gentleman who was a long time employee at Electric Boat. He was injured in 1984 when he fell and sustained a significant injury to his right wrist. The nature of the original injury is not evident to me as I do not have records documenting it. Nevertheless, he developed chronic wrist pain and radiocarpal arthritis. He eventually underwent a radiocarpal arthrodesis as well as multiple subsequent surgeries. Despite all of these surgeries, he continues to have chronic wrist pain.

It is not clear to me that the source of his wrist and hand pain has been clearly identified. He has excellent pronation and supination. He has had two distal ulnar arthroplasties already. It is unlikely that a third procedure would significantly change his level of pain.

There are hypertrophic degenerative changes at the base of the index and middle finger carpal metacarpal joints. This may be a source of discomfort for him.

Mr. Eames' weak grip is probably in part due to the slightly flexed position of his arthrodesis. His power grip would probably be better if he was in more wrist extension.

Post-operatively he was placed into a long arm spica cast. There was (sic) problems with hematoma at the iliac crest bone graft site. Evaluation in May 1992 noted that the intercarpal joints did not yet have bridging bone. On July 6, 1994 he was noted to have recurrence of volar ganglion on his right wrist. The diagnosis was made for surgery. Surgery was performed on August 8, 1994. Distal

radioulnar joint arthroplasty and flexor carpi radioalis sheath was explored and there was no ganglion noted.

Post-operatively he had physical therapy. On February 13, 1995 he returned with increased pain in the right wrist. There was snapping with pronation and supination. There is noted to be ectopic bone at the distal aspect of the ulna and arthritic changes between the pisiform and triquetrum. He underwent revision of the right distal radioulnar joint and excision of the pisiform on May 8, 1995.

On July 9, 1997 he had pain in the right wrist. Apparently he was doing well until January when he noted increased snapping. The pain was on the ulnar side. Radiographs showed heterotopic bone between the distal ulnar and triquetrum. Recommendations for further surgery was made...

The fact that Mr. Eames has depression that is significant enough to contribute to his overall disability is important in that it may have a significant impact upon his musuloskeletal complaints...

DISABILITY STATUS:

Mr. Eames is partially disabled due to his wrist injury. It is not the sole cause of his disability. Apparently his hypertension and depression have been determined to be part of his overall disability. He is capable of performing modified duty work activities with his right upper extremity. I am unable to apportion his impairment relative to his depression and hypertension. His impairment related to his right upper extremity based upon the AMA **Guidelines**, Fourth Edition, is 30 percent upper extremity impairment due to his wrist arthrodesis in 5 to 10 degrees of flexion and neutral radioulnar deviation. This is equivalent to 18 percent whole person impairment.

He has reached a point of maximal medical improvement.

CAUSALITY:

Mr. Eames' current right wrist pain and dysfunction is causally related to the injury that occurred while he was employed at Electric Boat on 5/22/84. He does not appear to have had any previous condition or injury that would substantially contribute to his upper extremity impairment.

The opinions provided in this report are to a reasonable degree of medical certainty.

The Employer also referred Claimant for a second opinion by a Dr. William A. Wainright, a specialist in hand surgery, and the doctor concluded as follows in his March 12, 1998 report to the Employer (RX 24-4):

IMPRESSION: 60 year old man with multiple medical problems. He is status post several surgical procedures on his right wrist after an injury dating back to 1984. He continues to have symptoms about the wrist in spite of his multiple surgical interventions. He does have a marked disability due to his right wrist condition. He should have permanent lifting restrictions. He should have restrictions with no more than 20% of lifting or push/pull. He should be restricted from ladder climbing.

The patient has reached maximum medical improvement. This occurred approximately one year after his latest surgical procedure which was May 8, 1995. Therefore, he reached maximum medical improvement approximately in May of 1996.

I would agree with Dr. Green's disability rating which is 30% of the upper extremity.

His condition does appear to be related to his employment at Electric Boat.

As mentioned above, he has multiple problems including coronary artery disease and hypertension and chronic depression. He has been unemployed for the past five or six years.

I would be hesitant to recommend any further surgeries on him. His overall medical condition is less than ideal. He has had multiple surgical procedures already on the ulnar aspect of the wrist making it more likely for him to have post-operative complications such as wound infection. In addition, and perhaps most importantly, his previous ulnar wrist surgeries have produced temporary, if any, benefit. In addition, I do not feel surgery in indicated for the CMC bossing and degenerative changes in the second and third rays as there is no clinical symptomatology found here.

Dr. Peter J. Rosenberg, an otolaryngologist, opined, as of March 23, 1999, that Claimant's daily exposure to loud noises as a maritime employment for at least sixteen years had resulted in a ten (10%) percent binaural hearing loss, that he “should wear ear protectors when exposed to loud noise and he should consider a hearing aid evaluation and trial period of amplification” and “should have his hearing re-tested every 2 years.” (RX 26-2)

Dr. S. Pearce Browning, III, an orthopedic surgeon with a subspeciality is surgery of the hands, examined Claimant on January 6, 1991 and concluded as follows (CX 7):

...Obviously, in considering this matter, one has to consider the entire person and not just the right wrist. Before going ahead with any surgical procedure, one would require a rather careful evaluation of the anesthetic risk from Dr. Fazio. If I were doing the surgery, which I will not be, I would want to sit down with Dr. Fazio personally and discuss the matter in some detail, and I would

also probably want to discuss it with one of the anesthesiologists. Probably the best place for him to have this done would be Lawrence & Memorial, which is Dr. Fazio's hospital, because the main hazard from this surgery is basically from anesthesia and his hypertension.

As to the choice of surgery, several possibilities are present. First, he apparently has had a ganglion recurrence and he also has suggestion of having a tendinitis in the abductor tendons of the thumb, **i.e.**, deQuervain's. These probably should be cleared at the time of surgery. However, I think I agree with Dr. Chung that if you're going to do any surgery you're probably going to have to do a wrist fusion, and the question is going to be, "How extensive?", and whether you want to try a limited wrist fusion, which would be fusion of the scaphoid and lunate to the distal radius; or whether you want to go for entire wrist. Either option is possible. The scapho-lunate radial fusion is, I think, a bit less of a surgical procedure and the one to which I would give the most serious consideration. This patient would have to accept in advance the fact that he might require a second operation to complete a full carpal bone fusion.

At the present moment, the wrist motion is somewhat limited but not badly but it is uncomfortable, and based on the x-rays of January 22nd, 1990 and February 26th, 1990, there is no question that the particular joint surfaces described above are permanently destroyed. I would suggest a rating of 20% permanent partial impairment of the right wrist on the mast hand. If you went ahead to a full, solid operative fusion, this would amount to 30% of the hand and wrist. Probably before going ahead with a fusion, I would recommend that he wear a brace for several weeks in order to get used to what a fused wrist is like and what he could expect from it, according to Dr. Browning.

Claimant, who had experienced vision problems for several years, was examined by Dr. Browning on January 23, 1995 "for complaints of halos around lights" and the doctor sent the following letter on November 15, 1995 to Claimant's attorney (CX 11):

I last examined Walter Eames 1/13/95 for complaints of halos around lights. On that occasion, his vision was 20/20 right eye and 20/400 vision left eye (long term amblyopia). Bilateral lens implants were done by me in 1987 for cataracts with subsequent YAG capsulotomies.

Intraocular pressures were normal and fundus examination was notable for tortuous vessels. Blood pressure was checked and found to be 150-180/102-110 with several readings.

Impression on exam was hypertension and halos possibly secondary to Intraocular lens reflections. He was advised to follow-up on the

blood pressure finding with his primary medical doctor, according to Dr. Browning.

Claimant testified that he had experienced harassment from his supervisors and others at the shipyard for many years, that he was improperly reassigned to second shift, that these conditions were percolating within him during this time, that his supervisors kept "pushing and pushing" him to increase production unreasonably and with lesser workers, that his blood pressure became elevated and remained so consistently to such an extent that nurses at the Employer's First Aid "kept sending (him) home because (his) blood pressure was way too high," that he was reassigned to work on the waterfront and directed to work overtime, although his doctor had prohibited such overtime, that he has been treated and evaluated by a number of doctors for his various medical problems, that he was filled with anxiety and stress whenever he was at work, that he takes various medications for his orthopedic, cardiovascular and emotional problems, that he is participating in a hypertensive clinical program at the University of Massachusetts Medical Center that he has been unable to return to work since July 2, 1989 and that he is receiving Social Security disability benefits as that agency has declared him to be totally disabled for all employment because of his multiple medical problems. As his right wrist has been fused, he can move only the fingers of that hand and, as a result, he leads a mostly sedentary life, although he does spend some time, several days each week, helping out at his local fire department. (TR 21-32; RX 27 at 11-26, RX 9)

On the basis of the totality of this record and having observed the demeanor and heard the testimony of a credible Claimant, I make the following:

Findings of Fact and Conclusions of Law

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459 (1968), **reh. denied**, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978).

The Act provides a presumption that a claim comes within its provisions. **See** 33 U.S.C. §920(a). This Section 20 presumption

"applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), **aff'd**, 620 F.2d 71 (5th Cir. 1980); **Hampton v. Bethlehem Steel Corp.**, 24 BRBS 141 (1990); **Anderson v. Todd Shipyards**, **supra**, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that "[a] **prima facie** 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." **United States Indus./Fed. Sheet Metal, Inc., v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor**, 455 U.S. 608, 615 102 S. Ct. 1318, 14 BRBS 631, 633 (CRT) (1982), **rev'g Riley v. U.S. Indus./Fed. Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." **Id.** The presumption, though, is applicable once claimant establishes that he has sustained an injury, **i.e.**, harm to his body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific Dry Dock Industries**, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984); **Kelaita**, **supra**. Once this **prima facie** case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. **Parsons Corp. of California v. Director, OWCP**, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301, 305 (1989); **Kier**, **supra**. Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the

record as a whole must be evaluated to determine the issue of causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981); **Holmes v. Universal Maritime Serv. Corp.**, 29 BRBS 18 (1995). In such cases, I must weigh all of the evidence relevant to the causation issue. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **Holmes, supra**; **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

To establish a **prima facie** case for invocation of the Section 20(a) presumption, claimant must prove that (1) he suffered a harm, and (2) an accident occurred or working conditions existed which could have caused the harm. **See**, **e.g.**, **Noble Drilling Company v. Drake**, 795 F.2d 478, 19 BRBS 6 (CRT) (5th Cir. 1986); **James v. Pate Stevedoring Co.**, 22 BRBS 271 (1989). If claimant's employment aggravates a non-work-related, underlying disease so as to produce incapacitating symptoms, the resulting disability is compensable. **See Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986); **Gardner v. Bath Iron Works Corp.**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). If employer presents "specific and comprehensive" evidence sufficient to sever the connection between claimant's harm and his employment, the presumption no longer controls, and the issue of causation must be resolved on the whole body of proof. **See**, **e.g.**, **Leone v. Sealand Terminal Corp.**, 19 BRBS 100 (1986).

The Board has held that the Claimant's credible testimony about subjective symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case for Section 20(a) invocation. **See Sylvester v. Bethlehem Steel Corp.**, 14 BRBS 234, 236 (1981), **aff'd**, 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982). Moreover, I may properly rely on Claimant's statements to establish that he experienced a work-related harm, and as it is undisputed that a work accident occurred which could have caused the harm, the Section 20(a) presumption is invoked in this case. **See**, **e.g.**, **Sinclair v. United Food and Commercial Workers**, 23 BRBS 148, 151 (1989). Moreover, Employer's general contention that the clear weight of the record evidence establishes rebuttal of the presumption is not sufficient to rebut the presumption. **See generally Miffleton v. Briggs Ice Cream Co.**, 12 BRBS 445 (1980).

The presumption of causation can be rebutted only by “substantial evidence to the contrary” offered by the employer. 33 U.S.C. § 920. What this requirement means is that the employer must offer evidence which completely **rules out the** connection between the alleged event and the alleged harm. In **Caudill v. Sea Tac Alaska Shipbuilding**, 25 BRBS 92 (1991), the carrier offered a medical expert who testified that an employment injury did not “play a significant role” in contributing to the back trouble at issue in this case. The Board held such evidence insufficient as a matter of law to rebut the presumption because the testimony did not completely rule out the role of the employment injury in

contributing to the back injury. **See also Cairns v. Matson Terminals, Inc.**, 21 BRBS 299 (1988) (medical expert opinion which did entirely attribute the employee's condition to non-work-related factors was nonetheless insufficient to rebut the presumption where the expert equivocated somewhat on causation elsewhere in his testimony). Where the employer/carrier can offer testimony which completely severs the causal link, the presumption is rebutted. **See Phillips v. Newport News Shipbuilding & Dry Dock Co.**, 22 BRBS 94 (1988) (medical testimony that claimant's pulmonary problems are consistent with cigarette smoking rather than asbestos exposure sufficient to rebut the presumption).

For the most part only medical testimony can rebut the Section 20(a) presumption. **But see Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989) (holding that asbestosis causation was not established where the employer demonstrated that 99% of its asbestos was removed prior to the claimant's employment while the remaining 1% was in an area far removed from the claimant and removed shortly after his employment began). Factual issues come in to play only in the employee's establishment of the **prima facie** elements of harm/possible causation and in the later factual determination once the Section 20(a) presumption passes out of the case.

Once rebutted, the presumption itself passes completely out of the case and the issue of causation is determined by examining the record "as a whole". **Holmes v. Universal Maritime Services Corp.**, 29 BRBS 18 (1995). Prior to 1994, the "true doubt" rule governed the resolution of all evidentiary disputes under the Act; where the evidence was in equipoise, all factual determinations were resolved in favor of the injured employee. **Young & Co. v. Shea**, 397 F.2d 185, 188 (5th Cir. 1968), **cert. denied,** 395 U.S. 920, 89 S. Ct. 1771 (1969). The Supreme Court held in 1994 that the "true doubt" rule violated the Administrative Procedure Act, the general statute governing all administrative bodies. **Director, OWCP v. Greenwich Collieries**, 512 U.S. 267, 114 S. Ct. 2251, 28 BRBS 43 (CRT) (1994). Accordingly, after **Greenwich Collieries** the employee bears the burden of proving causation by a preponderance of the evidence after the presumption is rebutted.

As neither party disputes that the Section 20(a) presumption is invoked, **see Kelaita v. Triple A Machine Shop**, 13 BRBS 326 (1981), the burden shifts to employer to rebut the presumption with substantial evidence which establishes that claimant's employment did not cause, contribute to, or aggravate his condition. **See Peterson v. General Dynamics Corp.**, 25 BRBS 71 (1991), **aff'd sub nom. Insurance Company of North America v. U.S. Dept. of Labor**, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), **cert. denied,** 507 U.S. 909, 113 S. Ct. 1264 (1993); **Obert v. John T. Clark and Son of Maryland,** 23 BRBS 157 (1990); **Sam v. Loffland Brothers Co.**, 19 BRBS 228 (1987). The unequivocal testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. **See Kier v. Bethlehem**

Steel Corp., 16 BRBS 128 (1984). If an employer submits substantial countervailing evidence to sever the connection between the injury and the employment, the Section 20(a) presumption no longer controls and the issue of causation must be resolved on the whole body of proof. **Stevens v. Tacoma Boatbuilding Co.**, 23 BRBS 191 (1990). This Administrative Law Judge, in weighing and evaluating all of the record evidence, may place greater weight on the opinions of the employee's treating physician as opposed to the opinion of an examining or consulting physician. In this regard, **see Pietrunti v. Director, OWCP**, 119 F.3d 1035, 31 BRBS 84 (CRT)(2d Cir. 1997). **See also Sir Gean Amos v. Director, OWCP**, 153 F.3d 1051 (9th Cir. 1998), **amended**, 164 F.3d 480, 32 BRBS 144 (CRT)(9th Cir. 1999).

In the case **sub judice**, Claimant alleges that the harm to his bodily frame, **i.e.**, his generalized anxiety disorder, hypertension, cardiac disease and major depression (CX 1), as well as his impairment of the right upper extremity, resulted from working conditions at the Employer's shipyard. The Employer has introduced no evidence severing the connection between such harm and Claimant's maritime employment. Thus, Claimant has established a **prima facie** claim that such harm is a work-related injury, as shall now be discussed.

Injury

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. **See** 33 U.S.C. §902(2); **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1312 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. **Gardner v. Bath Iron Works Corporation**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385 (1st Cir. 1981); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Januszewicz v. Sun Shipbuilding and Dry Dock Company**, 22 BRBS 376 (1989) (**Decision and Order on Remand**); **Johnson v. Ingalls Shipbuilding**, 22 BRBS 160 (1989); **Madrid v. Coast Marine Construction**, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash**, 782 F.2d 513 (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966); **Kooley v. Marine Industries Northwest**, 22 BRBS 142 (1989); **Mijangos v. Avondale Shipyards, Inc.**, 19 BRBS 15 (1986); **Rajotte v. General**

Dynamics Corp., 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mijangos**, **supra**; **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990); **Care v. WMATA**, 21 BRBS 248 (1988).

This closed record conclusively establishes, and I so find and conclude, that Claimant's maritime employment for sixteen years, especially the stressful conditions under which he worked, resulted in his psychological problems, on December 21, 1988, that Claimant's May 22, 1984 right arm injury has resulted in a 29.75% impairment of the right upper extremity, that the Employer had timely notice of such injuries, authorized appropriate medical care and treatment and paid to Claimant certain compensation benefits as stipulated by the parties (TR 7) and as reflected in this closed record (RX 5 - RX7) and that Claimant timely filed for benefits once a dispute arose between the parties. In fact, the principal issue is the nature and extent of Claimant's disability, an issue I shall now resolve.

Nature and Extent of Disability

It is axiomatic that disability under the Act is an economic concept based upon a medical foundation. **Quick v. Martin**, 397 F.2d 644 (D.C. Cir. 1968); **Owens v. Traynor**, 274 F. Supp. 770 (D.Md. 1967), **aff'd**, 396 F.2d 783 (4th Cir. 1968), **cert. denied**, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. **Nardella v. Campbell Machine, Inc.**, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury. **American Mutual Insurance Company of Boston v. Jones**, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. (**Id**. at 1266)

Claimant has the burden of proving the nature and extent of his disability without the benefit of the Section 20 presumption. **Carroll v. Hanover Bridge Marina**, 17 BRBS 176 (1985); **Hunigman v. Sun Shipbuilding & Dry Dock Co.**, 8 BRBS 141 (1978). However, once claimant has established that he is unable to return to his former employment because of a work-related injury or occupational disease, the burden shifts to the employer to demonstrate the availability of suitable alternate employment or realistic job opportunities which claimant is capable of performing and which he

could secure if he diligently tried. **New Orleans (Gulfwide) Stevedores v. Turner**, 661 F.2d 1031 (5th Cir. 1981); **Air America v. Director**, 597 F.2d 773 (1st Cir. 1979); **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Preziosi v. Controlled Industries**, 22 BRBS 468, 471 (1989); **Elliott v. C & P Telephone Co.**, 16 BRBS 89 (1984). While Claimant generally need not show that he has tried to obtain employment, **Shell v. Teledyne Movible Offshore, Inc.**, 14 BRBS 585 (1981), he bears the burden of demonstrating his willingness to work, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), once suitable alternate employment is shown. **Wilson v. Dravo Corporation**, 22 BRBS 463, 466 (1989); **Royce v. Elrich Construction Company**, 17 BRBS 156 (1985).

On the basis of the totality of this closed record, I find and conclude that Claimant has established that he cannot return to any work at this time. The burden thus rests upon the Employer to demonstrate the existence of suitable alternate employment in the area. If the Employer does not carry this burden, Claimant is entitled to a finding of total disability. **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976). **Southern v. Farmers Export Company**, 17 BRBS 64 (1985). In the case at bar, the Employer did not submit any evidence as to the availability of suitable alternate employment. **See Pilkington v. Sun Shipbuilding and Dry Dock Company**, 9 BRBS 473 (1978), **aff'd on reconsideration after remand**, 14 BRBS 119 (1981). **See also Bumble Bee Seafoods v. Director, OWCP**, 629 F.2d 1327 (9th Cir. 1980). I therefore find Claimant has a total disability.

Claimant's injury has become permanent. A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. **General Dynamics Corporation v. Benefits Review Board**, 565 F.2d 208 (2d Cir. 1977); **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968), **cert. denied**, 394 U.S. 976 (1969); **Seidel v. General Dynamics Corp.**, 22 BRBS 403, 407 (1989); **Stevens v. Lockheed Shipbuilding Co.**, 22 BRBS 155, 157 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56 (1985); **Mason v. Bender Welding & Machine Co.**, 16 BRBS 307, 309 (1984). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of "maximum medical improvement." The determination of when maximum medical improvement is reached so that claimant's disability may be said to be permanent is primarily a question of fact based on medical evidence. **Lozada v. Director, OWCP**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Care v. Washington Metropolitan Area Transit Authority**, 21 BRBS 248 (1988); **Wayland v. Moore Dry Dock**, 21 BRBS 177 (1988); **Eckley v. Fibrex and Shipping Company**, 21 BRBS 120 (1988); **Williams v. General Dynamics Corp.**, 10 BRBS 915 (1979).

The Benefits Review Board has held that a determination that claimant's disability is temporary or permanent may not be based on a prognosis that claimant's condition may improve and become stationary at some future time. **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979). The Board has also held that a disability need not be "eternal or everlasting" to be permanent and the possibility of a favorable change does not foreclose a finding of permanent disability. **Exxon Corporation v. White**, 617 F.2d 292 (5th Cir. 1980), **aff'g** 9 BRBS 138 (1978). Such future changes may be considered in a Section 22 modification proceeding when and if they occur. **Fleetwood v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 282 (1984), **aff'd**, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985).

Permanent disability has been found where little hope exists of eventual recovery, **Air America, Inc. v. Director, OWCP**, 597 F.2d 773 (1st Cir. 1979), where claimant has already undergone a large number of treatments over a long period of time, **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979), even though there is the possibility of favorable change from recommended surgery, and where work within claimant's work restrictions is not available, **Bell v. Volpe/Head Construction Co.**, 11 BRBS 377 (1979), and on the basis of claimant's credible complaints of pain alone. **Eller and Co. v. Golden**, 620 F.2d 71 (5th Cir. 1980). Furthermore, there is no requirement in the Act that medical testimony be introduced, **Ballard v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 676 (1978); **Ruiz v. Universal Maritime Service Corp.**, 8 BRBS 451 (1978), or that claimant be bedridden to be totally disabled, **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968). Moreover, the burden of proof in a temporary total case is the same as in a permanent total case. **Bell**, **supra**. **See also Walker v. AAF Exchange Service**, 5 BRBS 500 (1977); **Swan v. George Hyman Construction Corp.**, 3 BRBS 490 (1976). There is no requirement that claimant undergo vocational rehabilitation testing prior to a finding of permanent total disability, **Mendez v. Bernuth Marine Shipping, Inc.**, 11 BRBS 21 (1979); **Perry v. Stan Flowers Company**, 8 BRBS 533 (1978), and an award of permanent total disability may be modified based on a change of condition. **Watson v. Gulf Stevedore Corp.**, **supra**.

An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement. **Lozada v. General Dynamics Corp.**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Sinclair v. United Food & Commercial Workers**, 13 BRBS 148 (1989); **Trask v. Lockheed Shipbuilding & Construction Co.**, 17 BRBS 56 (1985). A condition is permanent if claimant is no longer undergoing treatment with a view towards improving his condition, **Leech v. Service Engineering Co.**, 15 BRBS 18 (1982), or if his condition has stabilized. **Lusby v. Washington Metropolitan Area Transit Authority**, 13 BRBS 446 (1981).

On the basis of the totality of the record, I find and conclude that Claimant, with reference to his psychological problems, reached maximum medical improvement on October 4, 1990 and that he has been permanently and totally disabled from October 5, 1990, according to the well-reasoned opinion of Dr. Ruffner.

As noted, the parties have compromised the four ratings given for the Claimant's May 22, 1984 right arm injury and have stipulated that such injury has resulted in a 29.75% permanent partial impairment of the right upper extremity (TR 7), and I accept such compromise as reasonable herein.

Accordingly, Claimant is entitled to an award of benefits for such impairment commencing on February 12, 1995, at the weekly compensation rate of $386.63, pursuant to Section 8(c)(1) of the Act. Dr. Willetts opined that Claimant reached maximum medical improvement six months after his right arm surgery on August 8, 1994. (RX 10)

Moreover, Claimant is also entitled to an award of temporary total disability for his work-related stress injury, hypertension and cardiovascular disease from March 23, 1988 through October 4, 1990, at which time he is entitled to an award of permanent total disability benefits, and such benefits, which shall continue until further **ORDER** of this Court, shall be paid at the weekly rate of $437.47.

It is well-settled that these concurrent awards are permitted under the Longshore Act because the prior injury of May 22, 1984, resulting in the 29.75% impairment of the right arm, occurred prior to the December 21, 1988 injury which has resulted in Claimant's permanent total disability as of October 5, 1990. In this regard, **see Brady-Hamilton Stevedore Co. v. Director, OWCP**, 58 F.3d 419, 29 BRBS 101(CRT)(9th Cir. 1995); **Hastings v. Earth Satellite Corp.**, 628 F.2d 85, 14 BRBS 345 (D.C. Cir. 1980), **cert. denied**, 449 U.S. (1980); **Green v. ITO Corp. of Baltimore**, 32 BRBS 67 (1998); **Ward v. Cascade General, Inc.**, 31 BRBS 65 (1996); **Hansen v. Container Stevedoring Co.**, 31 BRBS 155 (1997); **Turney v. Bethlehem Steel Corp.**, 17 BRBS 232 (1985); **Crum v. General Adjustment Bureau**, 16 BRBS 101 (1983).

Furthermore, Claimant is not entitled to an award of benefits for his work-related hearing loss as his date of injury is March 23, 1999, pursuant to Dr. Rosenberg's report, and as he has been permanently and totally disabled since October 5, 1990. In this regard, **see Korineck v. General Dynamics Corp.**, 835 F.2d 42, 20 BRBS 63 (CRT)(2d Cir. 1987).

Interest

Although not specifically authorized in the Act, it has been accepted practice that interest at the rate of six (6) percent per annum is assessed on all past due compensation payments. **Avallone v. Todd Shipyards Corp.**, 10 BRBS 724 (1978). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. **Watkins v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 556 (1978), **aff'd in pertinent part** and **rev'd on other grounds sub nom. Newport News v. Director, OWCP**, 594 F.2d 986 (4th Cir. 1979); **Santos v. General Dynamics Corp.**, 22 BRBS 226 (1989); **Adams v. Newport News Shipbuilding**, 22 BRBS 78 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 26, 50 (1989); **Caudill v. Sea Tac Alaska Shipbuilding**, 22 BRBS 10 (1988); **Perry v. Carolina Shipping**, 20 BRBS 90 (1987); **Hoey v. General Dynamics Corp.**, 17 BRBS 229 (1985). The Board concluded that inflationary trends in our economy have rendered a fixed six percent rate no longer appropriate to further the purpose of making claimant whole, and held that ". . . the fixed six percent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." **Grant v. Portland Stevedoring Company**, 16 BRBS 267, 270 (1984), **modified on reconsideration**, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

Medical Expenses

An Employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. **Perez v. Sea-Land Services, Inc.**, 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. **Colburn v. General Dynamics Corp.**, 21 BRBS 219, 22 (1988); **Barbour v. Woodward & Lothrop, Inc.**, 16 BRBS 300 (1984). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. **Addison v. Ryan-Walsh Stevedoring Company**, 22 BRBS 32, 36 (1989); **Mayfield v. Atlantic & Gulf Stevedores**, 16 BRBS 228 (1984); **Dean v. Marine Terminals Corp.**, 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. **Bulone v. Universal Terminal and Stevedore Corp.**, 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injuries. **Tough v. General Dynamics**

Corporation, 22 BRBS 356 (1989); **Gilliam v. The Western Union Telegraph Co.**, 8 BRBS 278 (1978).

Section 14(e)

Claimant is not entitled to an award of additional compensation, pursuant to the provisions of Section 14(e), as the Employer, although initially controverting Claimant's entitlement to benefits (RX 4), nevertheless has accepted the claim, provided the necessary medical care and treatment and voluntarily paid certain compensation benefits to Claimant while he has been unable to return to work. **Ramos v. Universal Dredging Corporation**, 15 BRBS 140, 145 (1982); **Garner v. Olin Corp.**, 11 BRBS 502, 506 (1979).

Section 8(f) of the Act

Regarding the Section 8(f) issue, the essential elements of that provision are met, and employer's liability is limited to one hundred and four (104) weeks, if the record establishes that (1) the employee had a pre-existing permanent partial disability, (2) which was manifest to the employer prior to the subsequent compensable injury and (3) which combined with the subsequent injury to produce or increase the employee's permanent total or partial disability, a disability greater than that resulting from the first injury alone. **Lawson v. Suwanee Fruit and Steamship Co.**, 336 U.S. 198 (1949); **FMC Corporation v. Director, OWCP**, 886 F.2d 118523 BRBS 1 (CRT) (9th Cir. 1989); **Director, OWCP v. Cargill, Inc.**, 709 F.2d 616 (9th Cir. 1983); **Director, OWCP v. Newport News & Shipbuilding & Dry Dock Co.**, 676 F.2d 110 (4th Cir. 1982); **Director, OWCP v. Sun Shipbuilding & Dry Dock Co.**, 600 F.2d 440 (3rd Cir. 1979); **C & P Telephone v. Director, OWCP**, 564 F.2d 503 (D.C. Cir. 1977); **Equitable Equipment Co. v. Hardy**, 558 F.2d 1192 (5th Cir. 1977); **Shaw v. Todd Pacific Shipyards**, 23 BRBS 96 (1989); **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989); **McDuffie v. Eller and Co.**, 10 BRBS 685 (1979); **Reed v. Lockheed Shipbuilding & Construction Co.**, 8 BRBS 399 (1978); **Nobles v. Children's Hospital**, 8 BRBS 13 (1978). The provisions of Section 8(f) are to be liberally construed. **See Director v. Todd Shipyard Corporation**, 625 F.2d 317 (9th Cir. 1980). The benefit of Section 8(f) is not denied an employer simply because the new injury merely aggravates an existing disability rather than creating a separate disability unrelated to the existing disability. **Director, OWCP v. General Dynamics Corp.**, 705 F.2d 562, 15 BRBS 30 (CRT) (1st Cir. 1983); **Kooley v. Marine Industries Northwest**, 22 BRBS 142, 147 (1989); **Benoit v. General Dynamics Corp.**, 6 BRBS 762 (1977).

The employer need not have actual knowledge of the pre-existing condition. Instead, "the key to the issue is the availability to the employer of knowledge of the pre-existing

condition, not necessarily the employer's actual knowledge of it." **Dillingham Corp. v. Massey**, 505 F.2d 1126, 1228 (9th Cir. 1974). Evidence of access to or the existence of medical records suffices to establish the employer was aware of the pre-existing condition. **Director v. Universal Terminal & Stevedoring Corp.**, 575 F.2d 452 (3d Cir. 1978); **Berkstresser v. Washington Metropolitan Area Transit Authority**, 22 BRBS 280 (1989), **rev'd and remanded on other grounds sub nom. Director v. Berstresser, 921 F.2d 306 (D.C. Cir. 1990)**; **Reiche v. Tracor Marine, Inc.**, 16 BRBS 272, 276 (1984); **Harris v. Lambert's Point Docks, Inc.**, 15 BRBS 33 (1982), **aff'd**, 718 F.2d 644 (4th Cir. 1983). **Delinski v. Brandt Airflex Corp.**, 9 BRBS 206 (1978). Moreover, there must be information available which alerts the employer to the existence of a medical condition. **Eymard & Sons Shipyard v. Smith**, 862 F.2d 1220, 22 BRBS 11 (CRT) (5th Cir. 1989); **Armstrong v. General Dynamics Corp.**, 22 BRBS 276 (1989); **Berkstresser**, **supra**, at 283; **Villasenor v. Marine Maintenance Industries**, 17 BRBS 99, 103 (1985); **Hitt v. Newport News Shipbuilding and Dry Dock Co.**, 16 BRBS 353 (1984); **Musgrove v. William E. Campbell Company**, 14 BRBS 762 (1982). A disability will be found to be manifest if it is "objectively determinable" from medical records kept by a hospital or treating physician. **Falcone v. General Dynamics Corp.**, 16 BRBS 202, 203 (1984). Prior to the compensable second injury, there must be a medically cognizable physical ailment. **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989); **Brogden v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 259 (1984); **Falcone**, **supra**.

The pre-existing permanent partial disability need not be economically disabling. **Director, OWCP v. Campbell Industries**, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), **cert. denied**, 459 U.S. 1104 (1983); **Equitable Equipment Company v. Hardy**, 558 F.2d 1192, 6 BRBS 666 (5th Cir. 1977); **Atlantic & Gulf Stevedores v. Director, OWCP**, 542 F.2D 602 (3d Cir. 1976).

Section 8(f) relief is not applicable where the permanent total disability is due solely to the second injury. In this regard, **see Director, OWCP (Bergeron) v. General Dynamics Corp.**, 982 F.2d 790, 26 BRBS 139 (CRT)(2d Cir. 1992); **Luccitelli v. General Dynamics Corp.**, 964 F.2d 1303, 26 BRBS 1 (CRT)(2d Cir. 1992); **CNA Insurance Company v. Legrow**, 935 F.2d 430, 24 BRBS 202 (CRT)(1st Cir. 1991) In addressing the contribution element of Section 8(f), the United States Court of Appeals for the Second Circuit, in whose jurisdiction the instant case arises, has specifically stated that the employer's burden of establishing that a claimant's subsequent injury alone would not have cause claimant's permanent total disability is not satisfied merely by showing that the pre-existing condition made the disability worse than it would have been with only the subsequent injury. **See Director, OWCP v. General Dynamics Corp. (Bergeron), supra.**

On the basis of the totality of the record, I find and conclude that the Employer has satisfied these requirements. The

record reflects (1) that Claimant has worked for the Employer since December 1, 1975, (2) that he was in good health at that time, (3) that he injured his right wrist in a serious shipyard accident on May 22, 1984 (RX 1), (4) that such injury resulted in five surgical procedures, including a bone fusion of the right wrist, (5) that such impairment has been rated by Dr. Browning, Dr. Green, Dr. Wainwright and Dr. Zeppieri and the parties have compromised those ratings at 29.75% of the right upper extremity (TR 7), (6) that Claimant has carried a diagnosis of essential hypertension since at least 1978 or 1979 (RX 13), (7) that the stressful conditions at work aggravated and exacerbated such hypertension, (8) that the cumulative effect of the stress caused by employment and his personal life resulted in a new and discrete psychological injury on December 12, 1988, (9) that he has sustained previous work-related industrial accidents prior to December 21, 1988, (10) while working at the Employer's shipyard and (11) that Claimant's permanent total disability is the result of the combination of his pre-existing permanent partial disability (**i.e.**, his above-enumerated medical problems) and his December 21, 1988 injury as such pre-existing disability, in combination with the subsequent work injury, has contributed to a greater degree of permanent disability, according to Dr. Willetts (RX 10, RX 30), Dr. Fazio (RX 12), Dr. Borden (RX 13), Dr. Ruffner (RX 14), Dr. De Grand (RX 16, Dr. Lebowitz (RX 17), Dr. Green (RX 22), Dr. Wainwright (RX 24) and Dr. Benotti (RX 25). **See Atlantic & Gulf Stevedores v. Director**, OWCP, 542 F.2d 602, 4 BRBS 79 (3d Cir. 1976); **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989).

Claimant's condition, prior to his final injury on December 21, 1988, was the classic condition of a high-risk employee whom a cautious employer would neither have hired nor rehired nor retained in employment due to the increased likelihood that such an employee would sustain another occupational injury. **C & P Telephone Company v. Director, OWCP**, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977), **rev'g in part**, 4 BRBS 23 (1976); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Hallford v. Ingalls Shipbuilding**, 15 BRBS 112 (1982).

Even in cases where Section 8(f) is applicable, the Special Fund is not liable for medical benefits. **Barclift v. Newport News Shipbuilding & Dry Dock Co.**, 15 BRBS 418 (1983), **rev'd on other grounds sub nom. Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.**, 737 F.2d 1295 (4th Cir. 1984); **Scott v. Rowe Machine Works**, 9 BRBS 198 (1978); **Spencer v. Bethlehem Steel Corp.**, 7 BRBS 675 (1978).

The Board has held that an employer is entitled to interest, payable by the Special Fund, on monies paid in excess of its liability under Section 8(f). **Campbell v. Lykes Brothers Steamship Co., Inc.**, 15 BRBS 380 (1983); **Lewis v. American Marine Corp.**, 13 BRBS 637 (1981).

It is well-settled that Section 8(f) does not apply to Claimant's prior right arm injury on May 22, 1984 and that the Employer must pay 104 weeks of permanent benefits for Claimant's December 21, 1988 injury before the Special Fund will assume such payments. In this regard, **see Hastings v. Earth-Satellite Corp.**, 8 BRBS 519, 524 (1978), **aff'd in pertinent part and reversed on other grounds**, 628 F.2d 85, 14 BRBS 345 (D.C. Cir. 1980).

Attorney's Fee

Claimant's attorney, having successfully prosecuted this matter, is entitled to a fee assessed against the Employer as a self-insurer. Claimant's attorney shall file a fee application concerning services rendered and costs incurred in representing Claimant after June 23, 1999, the date of the informal conference. Services rendered prior to this date should be submitted to the District Director for her consideration. The fee petition shall be filed within thirty (30) days of receipt of this decision and Employer shall have ten (10) days to comment thereon.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is therefore **ORDERED** that:

1. The Employer as a self-insurer shall pay to the Claimant compensation for his temporary total disability from March 23, 1988 through October 4, 1990, at the weekly rate of $437.47, such compensation to be computed in accordance with Section 8(b) of the Act.

2. Commencing on October 5, 1990, and continuing thereafter for 104 weeks, the Employer shall pay to the Claimant compensation benefits for his permanent total disability, plus the applicable annual adjustments provided in Section 10 of the Act, based upon the weekly rate of $437.47, such compensation to be computed in accordance with Section 8(a) of the Act.

3. After the cessation of payments by the Employer, continuing benefits shall be paid, pursuant to Section 8(f) of the Act, from the Special Fund established in Section 44 of the Act until further Order.

4. The Employer shall also pay to Claimant compensation for his 29.75 percent permanent partial disability of the right arm,

based upon the weekly rate of $386.63, such compensation to be computed in accordance with Section 8(c)(1) of the Act and shall begin on February 12, 1995.

5. The Employer shall receive credit for all amounts of compensation previously paid to the Claimant as a result of his May 22, 1984 and December 21, 1988 injuries and during the time periods mentioned in ORDER provisions 1, 2 and 4 above. The Employer shall also receive a refund, with appropriate interest, of any overpayments of compensation made to Claimant herein.

6. Interest shall be paid by the Employer and Special Fund on all accrued benefits at the T-bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

7. The Employer shall furnish such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related injuries referenced herein may require, even after the time period specified in the second Order provision above, subject to the provisions of Section 7 of the Act.

8. Claimant's attorney shall file, within thirty (30) days of receipt of this Decision and Order, a fully supported and fully itemized fee petition, sending a copy thereof to Employer's counsel who shall then have ten (10) days to comment thereon. This Court has jurisdiction over those services rendered and costs incurred after the informal conference on June 23, 1999.

DAVID W. DI NARDI
Administrative Law Judge

Dated:
Boston, Massachusetts
DWD:jl